

**AUDREY L. RIDDER** )  
 Claimant )  
 VS. )  
 ) Docket No. 177,364  
**TOPEKA TRUCK PLAZA, INC.** )  
 Respondent )  
 AND )  
 )  
**HARTFORD ACCIDENT & INDEMNITY** )  
 Insurance Carrier )

The record considered by the Appeals Board is that shown in the Award with the exception of the preliminary hearing transcripts, all of which were explicitly excluded from consideration for final award purposes by Administrative Law Judge Floyd V. Palmer at the June 1995 regular hearing.

**ISSUES**

The Special Administrative Law Judge found claimant sustained a scheduled injury as the result of a December 28, 1991, work-related accident and awarded claimant permanent partial disability benefits for a 75 percent loss of use of the left lower extremity pursuant to K.S.A. 1991 Supp. 44-510d. Claimant requested the Appeals Board to review the following issues:

- (1) Are the March 19, March 25, June 6, and June 17, 1994, videotapes part of the evidentiary record?
- (2) What is the nature and extent of claimant's injury and disability?

Those are the only issues before the Appeals Board on this review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After considering the entire record, the Appeals Board finds as follows:

The Award should be modified.

The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent on December 25 and December 28, 1991. Because both accidents involved the left lower extremity and both were approximate in time, the parties agreed to treat the resultant injury as occurring on December 28, 1991.

Claimant contends she developed reflex sympathetic dystrophy in the left leg as a result of the work-related injury which caused her to limp. Claimant contends the resultant limp has, in turn, caused permanent impairment to her back. Claimant requests an award of permanent total disability benefits.

Respondent and its insurance carrier, on the other hand, contend claimant's injuries are limited to the left leg only and, therefore, claimant's disability benefits are limited to those of a "scheduled" injury under K.S.A. 1991 Supp. 44-510d. In the alternative, respondent and its insurance carrier contend claimant refused to work at an accommodated job the respondent had provided and, therefore, any permanent partial disability benefits should be limited to her functional impairment rating if the Appeals Board would find claimant entitled to an award for a "nonscheduled" injury under K.S.A. 1991 Supp. 44-510e.

- (1) Are the videotapes part of the evidentiary record?

The Appeals Board finds the March 19, March 25, June 6, and June 17, 1994, videotapes are not part of the evidentiary record to be considered for purposes of the final award in this proceeding.

At preliminary hearing the respondent and its insurance carrier introduced several videotapes purporting to show claimant on the dates above indicated. At the June 1995 regular hearing, when discussing whether the preliminary hearing transcripts and exhibits would be considered part of the evidentiary record for determining final award, Administrative Law Judge Floyd V. Palmer held they would not. Administrative Law Judge Palmer advised respondent's counsel he would need evidentiary depositions to lay a foundation if there was evidence from the preliminary hearings he wanted to have considered for purposes of final award.

Claimant contends the videotapes cannot be considered for final award purposes because of the Administrative Law Judge's order. Respondent and its insurance carrier contend the videotapes must be considered because of their probative value and because claimant had an opportunity to challenge their foundation and authenticity either at preliminary hearing or later when claimant began to submit evidence for final award purposes. The Appeals Board agrees with claimant's contention.

It is well settled that "medical reports or any other records or statements" introduced at preliminary hearing may not be considered as evidence when the Administrative Law Judge determines the final award unless the parties either stipulate to their admission or the report, record, or statement is later supported by testimony of the person making it. See K.A.R. 51-3-5a. However, the Administrative Law Judge is empowered to determine whether the remainder of the evidence introduced at preliminary hearing should be considered for purposes of final award. In this instance, at the June 1995 regular hearing the Administrative Law Judge specifically ruled the evidence introduced at preliminary hearing would not be considered for final award purposes. That holding then became the law of the case upon which the parties could reasonably rely. Because the respondent and its insurance carrier did not comply with the Administrative Law Judge's ruling, it is improper to consider the videotapes for final award purposes.

Respondent and its insurance carrier offered the videotapes into evidence at Dr. P. Brent Koprivica's deposition. The Appeals Board finds claimant's objection to those videotapes was both timely and proper. The videotapes may not be properly entered into the evidentiary record over claimant's objection merely because claimant's counsel inquired of Dr. Koprivica if their contents would change his opinion regarding the nature and extent of claimant's injury.

(2) What is the nature and extent of claimant's injury and disability?

A principal issue is whether claimant has developed permanent injury or permanent aggravation in her back as a direct result of the December 1991 accident. The Special

Administrative Law Judge found that claimant failed to prove both permanent impairment in the back and the necessary relationship between the reflex sympathetic dystrophy, her limp, and back condition.

Although it is not entirely clear when claimant began to experience low back symptoms, it appears from the various medical reports submitted into evidence without objection that claimant had an MRI of her lumbosacral spine in January 1994. Also, claimant told one physician who evaluated her that her low back symptoms began gradually and they may have started during exercises and therapy for the left ankle injury. That evidence would indicate claimant's low back complaints probably began sometime in 1993.

The parties presented the deposition testimony of three physicians, P. Brent Koprivica, M.D., Vito J. Carabetta, M.D., and Peter C. Boylan, M.D. Dr. Carabetta is board certified in physical medicine and rehabilitation, Dr. Koprivica is board certified in emergency medicine, and Dr. Boylan is a board-certified orthopedic surgeon.

Dr. Carabetta treated claimant and saw her 11 times between July 1992 and March 1994 for her left ankle sprain and reflex sympathetic dystrophy which had developed in the left leg. When he first saw claimant, she had a severe limp. He believes claimant has a 67 percent permanent partial functional impairment to the left lower extremity according to the AMA Guides to the Evaluation of Permanent Impairment. He also believes claimant could perform only sedentary activity and would need to elevate her leg to avoid swelling. Ideally, the leg whenever possible should be elevated above heart level. According to the doctor, claimant's reflex sympathetic dystrophy ranks among the worst five or ten cases he has ever seen. Dr. Carabetta believes claimant will need medication to control her ongoing leg pain.

Dr. Carabetta was not asked and, therefore, did not provide an opinion whether claimant had permanent impairment in her low back. However, he did testify that someone who walks with an altered gait is susceptible to back problems. Also, he does not recall and his notes do not reflect that claimant ever complained of her back during the period he treated her. He believes one would normally expect back problems to develop within the first few months after an altered gait begins.

Claimant presented the testimony of Dr. Koprivica who evaluated claimant at her attorney's request. He examined claimant in February 1995 and diagnosed reflex sympathetic dystrophy in the left leg and chronic soft tissue low back pain caused by the altered gait. He testified someone with reflex sympathetic dystrophy will typically have some days when they do fairly well and other days when they are totally disabled by the severe pain. Using the AMA Guides to the Evaluation of Permanent Impairment, Revised Third Edition, he believes claimant has a 75 percent functional impairment to the left lower extremity and a 10 percent whole body functional impairment due to the low back which combine for a 37 percent whole body functional impairment rating. He believes claimant's

back impairment is the natural consequence of claimant's reflex sympathetic dystrophy and the resulting altered gait.

Due to the lack of predictability of claimant's reflex sympathetic dystrophy, Dr. Koprivica believes claimant is prevented from holding substantial, gainful employment. He believes claimant is prevented from doing many sedentary jobs because she must elevate her foot higher than her hip to prevent swelling. Dr. Koprivica agrees with Dr. Carabetta that claimant will need pain medication on an ongoing basis.

Respondent presented the testimony of Dr. Boylan who evaluated claimant at the insurance carrier's request in August 1994. Dr. Boylan evaluated claimant's back only and diagnosed lumbosacral sprain which he believes could improve with such conservative treatment as medications, exercise, time, and modified eating habits. Claimant told the doctor her back pain began gradually and she thought it may have started when she was trying to do exercises and therapy for her ankle and foot. Dr. Boylan does not believe the lumbosacral sprain is a permanent condition and does not believe the back sprain was caused by either the reflex sympathetic dystrophy or claimant's limping. He believes claimant's back problems are caused by claimant's being overweight. However, on cross-examination he admits an altered gait could cause low back pain and problems.

Because of the severity of the reflex sympathetic dystrophy and resultant limp, the Appeals Board finds it is more probably true than not that claimant has also sustained impairment to her back as a direct and natural consequence of the December 1991 work-related injury. The first indication in the record that claimant's low back condition was permanent appears when claimant was evaluated by Dr. Koprivica on February 10, 1995. Therefore, that date will be used as the point claimant's injury transformed from a scheduled injury to the left leg to a nonscheduled injury involving the back.

For the initial left lower extremity injury, claimant's benefits are to be computed under K.S.A. 1991 Supp. 44-510d which provides in part:

"If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule: . . .

(16) For the loss of a leg, 200 weeks. . . .

(21) Permanent loss of the use of a finger, thumb, hand, arm, forearm, toe, foot, leg or lower leg or the permanent loss of the sight of an eye or the hearing of an ear, shall be equivalent to the loss thereof. For the permanent partial loss of the use of a finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of

an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period.”

Therefore, for the period commencing December 28, 1991, claimant is entitled to permanent partial disability benefits for a 67 percent permanent partial impairment of function to the left lower extremity. The 67 percent functional impairment is based upon the rating provided by claimant’s treating physician, Dr. Carabetta, whose opinion the Appeals Board finds the most persuasive regarding impairment to the left leg.

After claimant developed permanent back injury as a direct and natural result of the initial work-related injury, claimant became entitled to receive permanent partial general disability benefits as provided by K.S.A. 1991 Supp. 44-510e. That statute provides in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

The parties presented the testimony of vocational rehabilitation experts Michael J. Dreiling and Richard Santner. Mr. Dreiling testified claimant was essentially unemployable when one considered the medical restrictions of either Dr. Carabetta or Dr. Koprivica. Also, if one believed claimant was required to periodically elevate her left leg, she was essentially unemployable under the restrictions provided by Dr. Prostic who did not testify but whose opinions were utilized by both vocational rehabilitation experts without objection.

Mr. Santner testified he met with a representative from respondent on two occasions and believed respondent could accommodate claimant’s medical restrictions and return her to work at \$5 per hour. He also believed claimant had lost 76 percent of her ability to perform work in the open labor market considering Dr. Prostic’s restrictions and lost 93 to 95 percent of the same ability considering Dr. Carabetta’s. He also believed claimant retained the ability to earn between \$5.50 and \$7 per hour post injury.

The Appeals Board finds \$200 per week is indicative of claimant's post-injury wage earning abilities. The Appeals Board finds the respondent offered, and continues to offer, claimant accommodated work within her medical restrictions. However, based upon Mr. Santner's testimony, the offered job would only pay \$5 per hour, or \$200 per week for a 40-hour work week.

Although claimant's medical restrictions radically limit her ability to work, the Appeals Board finds claimant is not permanently and totally disabled. However, based on Mr. Santner's testimony, which the Appeals Board finds the more persuasive, the Appeals Board finds claimant has lost 94 percent of her ability to perform work in the open labor market and lost 25 percent of her ability to earn a comparable wage. The wage loss percentage was derived by comparing the approximate \$200 per week claimant could earn by returning to work for the respondent to the stipulated \$264.92 average weekly wage which claimant was earning at the time of the December 1991 accident.

Averaging the 94 percent loss of ability to perform work in the open labor market with the 25 percent loss of ability to earn a comparable wage, the Appeals Board finds claimant has a 60 percent permanent partial general disability as defined by K.S.A. 1991 Supp. 44-510e for the period commencing February 10, 1995.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Michael T. Harris dated December 31, 1996, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Audrey L. Ridder, and against the respondent, Topeka Truck Plaza, Inc., and its insurance carrier, Hartford Accident & Indemnity, for an accidental injury which occurred December 28, 1991, and based upon an average weekly wage of \$264.92 for 115 weeks of temporary total disability compensation at the rate of \$176.62 per week or \$20,311.30, followed by 47.86 weeks at the rate of \$176.62 per week or \$8,453.03, for a 67% permanent partial disability to the left leg for the period prior to February 10, 1995, followed thereafter by 252.14 weeks at the rate of \$105.97 per week or \$26,719.28, for a 60% permanent partial general disability, making a total award of \$55,483.61.

As of July 28, 1997, there is due and owing claimant 115 weeks of temporary total disability compensation at the rate of \$176.62 per week or \$20,311.30, followed by 47.86 weeks of permanent partial disability compensation at the rate of \$176.62 per week in the sum of \$8,453.03 and 128.43 weeks of permanent partial disability compensation at the rate of \$105.97 per week in the sum of \$13,609.73 for a total of \$42,374.06, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance

of \$13,109.55 is to be paid for 123.71 weeks at the rate of \$105.97 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts as its own the remaining orders set forth by the Special Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1997.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: James B. Biggs, Topeka, KS  
Brenden W. Webb, Overland Park, KS  
Michael T. Harris, Special Administrative Law Judge  
Philip S. Harness, Director